

BETTY J. THOMPSON

IBLA 78-219

Decided September 28, 1979

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting appellant's Native allotment application, AA-8252.

Affirmed as modified.

1. Alaska: Native Allotments

The substantial use and occupancy as required by the Native Allotment Act must be by the Native herself prior to the effective date of withdrawal, and she may not tack on use and occupancy by her parents or ancestors to establish a right for herself prior to the withdrawal.

2. Alaska: Native Allotments -- Recreation and Public Purposes Act -- Withdrawals and Reservations: Generally -- Withdrawals and Reservations: Effect of

A recreation and public purposes classification, issued pursuant to the Recreation Act of 1926, as amended, 43 U.S.C. § 869 (1976), segregates Alaskan lands from Native allotment applications until such time as the classification is revoked.

3. Withdrawals and Reservations: Generally -- Withdrawals and Reservations: Effect of

PLO No. 4582, as amended, withdraws the land included therein and bars a subsequent Native allotment application.

4. Administrative Procedure: Hearings -- Alaska: Native Allotments -- Rules of Practice: Appeals: Hearings

A request for a hearing on a Native allotment application will be denied where no factual dispute exists and all issues are legal ones.

5. Alaska: Native Allotments -- Recreation and Public Purposes Act -- Withdrawals and Reservations: Generally -- Withdrawals and Reservations: Effect of

Under Secretarial Order No. 3040, it is sufficient if the 5 years use and occupancy, required under the Native Allotment Act, is completed prior to the granting of the allotment, providing applicant either filed for his allotment or commenced use and occupancy prior to the withdrawal.

APPEARANCES: Frederick Torrisi, Esq., Alaska Legal Services Corporation, Dillingham, Alaska, for appellant.

#### OPINION BY ADMINISTRATIVE JUDGE GOSS

Betty J. Thompson appealed from the January 23, 1978, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting her Native allotment application AA-8252. The application was filed pursuant to the Alaska Native Allotment Act, 34 Stat. 197, as amended, 70 Stat. 954, formerly 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed subject to pending applications, section 18(a), Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617 (1976)).

Appellant, in her November 20, 1971, application, alleged substantial use and occupancy beginning August 1966 of an unsurveyed tract of land in T. 8 and 9 S., R. 31 W., Seward meridian. The application listed seasonal use for fishing and berrypicking. BLM field inspection on June 25, 1975, found evidence of improvements in the form of a house foundation and clearing of trees.

The northern corner of these lands is subject to Powersite Reserve No. 485 as of April 1, 1915; the remainder was segregated from appropriation by Recreation and Public Purposes Classification No. 142 from July 17, 1961, to January 20, 1969. On January 17, 1969, Public Land Order No. (PLO) 4582, as amended, withdrew the land until the passage of ANCSA on December 18, 1971.

Appellant asserts that the Recreation and Public Purposes Classification No. 142 (R&PP #142) lacks the effect of a withdrawal or reservation, that it necessarily expired January 17, 1963, and that R&PP #142 by its terms does not apply to the claimed allotment. Alternatively, appellant argues that even if R&PP #142 did not expire in 1963, it was sufficiently modified by Multiple Use Classification No. 818 (MUC #818) to give appellant rights to this land as of October 27, 1967. Appellant also disputes the applicability of Powersite Reserve No. 485. She maintains that she should be able to "tack on ancestral use and occupancy to avoid any possible segregative effect of either Powersite Reserve No. 485 or R&PP Order No. 142" and requests a hearing pursuant to Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), to demonstrate ancestral use.

[1] The substantial use and occupancy contemplated by the Allotment Act must be by a Native as an independent individual for himself or herself or as head of a household. Ann McNoise, 20 IBLA 169 (1975); Larry W. Dirks, Sr., 14 IBLA 401 (1974). Allotment rights are personal to the applicant. An applicant may not tack ancestral use and occupancy onto her own in order to establish the right to a Native allotment. Larry W. Dirks, Sr., supra.

[2] Appellant stated in her application and affidavit that she began using the claimed land in August 1966, well after R&PP #142 took effect in 1961. Public land, once classified, is rendered unavailable for appropriation indefinitely until the Secretary acts to revoke the classification. Buch v. Morton, 449 F.2d 600, 607 (9th Cir. 1971). The 18-month duration provision in R&PP #142 is not self-executing. Where, as here, a classification was unrevoked at the time of applicant's entry, the land was unavailable for appropriation. Because the appellant initiated use and occupancy when the land was unavailable, her application must be denied. Larry W. Dirks, Sr., supra. This principle applies to that portion withdrawn by Powersite Reserve No. 485 in 1915, as well as to R&PP #142.

Appellant misreads MUC #818. This notice explicitly stated that the lands included in the classification remained subject to the Recreation and Public Purposes Act of June 14, 1926, 43 U.S.C. § 869, pursuant to which R&PP #142 was issued. MUC #818 did not repeal R&PP #142; therefore it did not affect appellant's desired tract.

[3] Nor, after revocation of R&PP #142, did the appellant avoid the effects of PLO 4582. This order, issued January 17, 1969, withdrew unreserved public lands in Alaska and those which "become unreserved prior to the expiration of this order . . . from all forms of appropriation and disposition under the public land laws . . . ." PLO 4582 was extended by PLO 4962 and PLO 5081 until termination by

ANCSA. Valid claims which were initiated prior to PLO 4582 are considered on their merits. Rika Murphy, 42 IBLA 51 (1979); Warner Bergman (On Reconsideration), 31 IBLA 21 (1977); Frederick E. Heinz, 20 IBLA 174, 181 (1975) (Petition for Reconsideration Denied May 20, 1976). But appellant's was not a valid prior claim, since it was initiated on land that had already been classified under R&PP #142. Thus the land was never open to occupancy after 1961.

[4] These legal conclusions are based on the appellant's recitation of the facts. Under Pence v. Kleppe, supra, a hearing is required only where a factual dispute exists. Additional showings relating to ancestral use here would compel the same legal conclusions. Therefore, no evidentiary hearing is warranted. Ann McNoise, supra.

[5] The State Office held that an appellant must complete the required five years use and occupancy prior to the withdrawal. On May 25, 1979, in Order No. 3040, the Secretary directed that it is sufficient if the five years is completed prior to the granting of the allotment application, providing applicant either filed for his allotment or commenced use and occupancy prior to the withdrawal. To this extent, the State Office application is modified.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is affirmed as modified.

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Joseph W. Goss  
Administrative Judge

We concur:

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James L. Burski  
Administrative Judge

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Edward W. Stuebing  
Administrative Judge

